

Nicholas J. Henderson, OSB#074027

nhenderson@portlaw.com

Motschenbacher & Blattner, LLP

117 SW Taylor St., Suite 200

Portland, OR 97204

Telephone: (503) 417-0508

Facsimile: (503) 417-0528

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

In re:

EVERGREEN VINTAGE AIRCRAFT, INC.

Debtor.

Case No. 14-36770-rld11

OBJECTION TO WORLD FUEL'S MOTION
FOR POSTPONEMENT OF HEARING

Evergreen Vintage Aircraft, Inc. (the "Debtor") submits the following objection to World Fuel Services Inc.'s ("World Fuel") Motion to Postpone Valuation Hearing [Docket No. 94].

Filed with this Objection is the Declaration of Nicholas J. Henderson.

INTRODUCTION

On April 24, 2015, following several days of mediation with over a dozen parties, the Debtor filed motions for approve the sale of substantially all of its assets (the "Sale Motion") [Docket No. 75] in connection with a motion to approve a complex settlement agreement (the "Settlement Motion") [Docket No. 71] that would resolve over \$200,000,000 of claims asserted against the Debtor. The Debtor provided notice of hearing on these two motions, and provided notice that evidence would be received in support of these motions. An initial hearing took place on May 19, 2015, and it was determined that sole issue remaining to be decided before the

proposed settlement and sale could be approved was the value of the Debtor's DeHavilland DH-4M1—a vintage airplane in which World Fuel claims an interest. A final evidentiary hearing was scheduled for May 28, 2015, to determine the value of the subject aircraft.

Now, at the eleventh hour—after representing to the Court that it was going to present three appraisals to establish the value of the subject aircraft—World Fuel admits that it has no admissible evidence regarding the value of the subject aircraft, and requests postponement of the final evidentiary hearing. World Fuel's motion for postponement is as baseless as it is misleading, and must be denied.

FACTS

As is discussed above, World Fuel was notified of the evidentiary hearings on the Sale Motion and the Settlement Motion since April 24, 2015. World Fuel attended the initial hearing on this matter on May 19, 2015, and asserted that it would be prepared to present three experts with reports to establish the value of the subject aircraft. Then, at approximately 1:15 p.m. on the day before the final evidentiary hearing, James P. Laurick, counsel for World Fuel, contacted Debtor's counsel to confer about a motion to postpone the final evidentiary hearing. Declaration of Nicholas J. Henderson (the "Henderson Decl.") at ¶ 3. During this call, Mr. Laurick indicated that he wanted to postpone the hearing because Mr. Kenneth Dufour, the author of a 2012 appraisal of the subject aircraft, was hospitalized and unable to testify. *Id.* Mr. Laurick wanted to know if the Debtor would consent to the requested postponement. *Id.*

When asked if he had ever actually spoken with Mr. Dufour about the 2012 appraisal, or about testifying in this case, Mr. Laurick admitted that neither he nor anyone else in his firm had spoken directly with Mr. Dufour. Henderson Decl., ¶ 4. When asked if his firm or his client had actually retained Mr. Dufour or his company to provide an appraisal or testify as to the value

of the subject aircraft, Mr. Laurick admitted that he had not engaged Mr. Dufour, but “he was hoping to.” *Id.* None of these facts are disclosed in World Fuel’s motion for postponement.

Despite Mr. Laurick’s admissions that he has not spoken to or engaged the author of the 2012 appraisal, World Fuel seeks a postponement of the evidentiary hearing so that they can have additional time to find an alternative appraisers. World Fuel has been on notice of the evidentiary hearing on this issue since April 24, 2015, but has not even retained an expert to testify in this matter. World Fuel has no evidence to present to the Court to support its objections to the Settlement Motion and Sale Motion, and should not be allowed to delay this matter any further. The Court should deny the requested postponement.

ARGUMENT

1. Postponement is highly prejudicial to the Debtor, and should be denied.

The decision to grant or deny a continuance is a matter of discretion for the trial court. See *In re Khan*, No. BAP CC-11-1542-HPAD, 2012 WL 2043074, at *4 (B.A.P. 9th Cir. June 6, 2012), citing *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th Cir.2002). There is no mechanical test for determining when a denial of a continuance is a clear abuse of discretion; it involves a case-by-case analysis. *United States v. Kloehn*, 620 F.3d 1122, 1127 (9th Cir.2010). Four factors are considered when reviewing denials of requests for continuances:

- (1) the extent of the moving party’s diligence in preparing prior to the date set for hearing;
- (2) how likely it is that the need for a continuance could have been met if the continuance had been granted;
- (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party, including its witnesses; and
- (4) the extent to which the moving party might have suffered harm as a result of the denial of the continuance.

In re Khan, at *9; citing *United States v. Flynt*, 756 F.2d 1352, 1358–59 (9th Cir.1985).

After weighing the above factors, the Court must deny World Fuel's motion to postpone the hearing. World Fuel was on notice of the evidentiary hearing in this matter since April 24, 2015, but has not even spoken with or retained Mr. Dufour, or any other appraiser. World Fuel has not provided any evidence that it diligently prepared for the hearing on this matter.

The second factor also weighs against a postponement, because the 2012 appraisal is outdated and expired under its own terms. Therefore, the probative value of the 2012 appraisal, and Mr. Dufour's availability to testify about that appraisal, is speculative at best.

The third factor weighs against a continuance of the hearing, as this is the second hearing on this matter. The Debtor has prepared in earnest for the hearing, and has arranged for its expert to travel and appear at the scheduled time. Several other parties to the Debtor's proposed Settlement Agreement have also attended the hearings in this matter, and have worked diligently with the Debtor to resolve objections. To delay this matter further would impose unnecessary expense upon the Debtor, and could jeopardize the settlement and proposed sale that would resolve the vast majority of the claims in this case—especially in light of the upcoming hearing on Umpqua Bank's motion for relief from stay.

While World Fuel may be prejudiced by a denial of the motion to postpone the hearing, the prejudice is its own making. The upcoming hearing is World Fuel's second opportunity to present evidence in support of its objection to the Sale Motion and the Settlement Motion. However, at this time, World Fuel has no evidence to present at the hearing, and has no evidence that it has acted diligently in preparing for the upcoming hearing. As a result, the requested postponement must be denied.

/////

/////

2. The appraisal attached to Mr. Laurick's declaration is not admissible, and should be disregarded by the Court.

World Fuel seeks to block the Settlement Motion and the Sale Motion by presenting a 2012 appraisal allegedly prepared by Kenneth Dufour of Aviation Management Consultants. World Fuel attempts to get this appraisal before the court through the declaration of counsel, claiming that it is his "understanding" that World Fuel relied upon the 2012 appraisal in extending credit to the Debtor. Declaration of James P. Laurick (the "Laurick Decl.") at ¶ 2. Counsel's declaration is insufficient to authenticate the appraisal. Without the authors' testimony to authenticate the document, the 2012 appraisal is hearsay, as is Mr. Laurick's statement about his "understanding" of his client's use of the appraisal.

The 2012 appraisal fails to identify a methodology in arriving at the valuation conclusion—an omission fatal to the appraisals admissibility under FRE 702. Failing to identify the methodology used "thereby prevents the Court any means by which to assess the reliability of his opinions. As the Supreme Court has explained, "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., No. 1:00-1898*, 2008 WL 2324112, at *4 (S.D.N.Y. June 5, 2008). The 2012 appraisal seems to say "take my word for it," without any additional explanation. This is insufficient under the Federal Rules of Evidence.

There is no basis for the Court to admit or consider the 2012 appraisal, and thus the Court should disregard the 2012 appraisal that is attached to Mr. Laurick's declaration. The appraisal should not be considered as evidence in determining the value of the subject aircraft at the hearing on May 28, 2015.

WHEREFORE, the Debtor respectfully requests that the Court deny World Fuel's Motion to Postpone Valuation Hearing, and also that the Court disregard the 2012 appraisal that is attached to the Declaration of James P. Laurick.

Dated: May 27, 2015

/s/ Nicholas J. Henderson

Nicholas J. Henderson, OSB #074027
Of Attorneys for Debtor

Nicholas J. Henderson, OSB#074027

nhenderson@portlaw.com

Motschenbacher & Blattner, LLP

117 SW Taylor St., Suite 200

Portland, OR 97204

Telephone: (503) 417-0508

Facsimile: (503) 417-0528

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

In re:

EVERGREEN VINTAGE AIRCRAFT, INC.

Debtor.

Case No. 14-36770-rld11

DECLARATION OF NICHOLAS J.
HENDERSON IN SUPPORT OF
OBJECTION TO MOTION TO POSTPONE
HEARING FILED BY WORLD FUEL
SERVICES, INC.

I, Nicholas J Henderson, hereby declare the following under penalty of perjury:

1. I am the attorney for Debtor Evergreen Vintage Aircraft, Inc. in the above-captioned bankruptcy proceeding.
2. I am over the age of 18, and I have personal knowledge of the facts stated in this declaration, and would testify to the same if called to do so.
3. On May 27, 2015, at 1:15 p.m., I was contacted by telephone by James P. Laurick, counsel for World Fuel Services, Inc. ("World Fuel") to confer about a motion to postpone the final evidentiary hearing in this matter. During this call, Mr. Laurick indicated to me that he wanted to postpone the hearing because Mr. Kenneth Dufour, the author of a 2012

Motschenbacher & Blattner, LLP

117 SW Taylor Street, Suite 200

Portland, OR 97204

Phone: (503) 417-0500

Fax: (503) 417-0501

appraisal of the subject aircraft, was hospitalized and unable to testify. Mr. Laurick wanted to know if the Debtor would consent to the requested postponement.

4. When asked if he had ever actually spoken with Mr. Dufour about the 2012 appraisal, or about testifying in this case, Mr. Laurick admitted that neither he nor anyone else in his firm had spoken directly with Mr. Dufour. When asked if his firm or his client had actually retained Mr. Dufour or his company to provide an appraisal or testify as to the value of the subject aircraft, Mr. Laurick admitted that he had not engaged Mr. Dufour, but “he was hoping to.”

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

DATED this 27th day of May, 2015.

/s/ Nicholas J. Henderson
Nicholas J. Henderson, Declarant

CERTIFICATE OF SERVICE

I, Nicholas J. Henderson, hereby certify that on May 27, 2015, I served, by first class mail, a full and true copy of the foregoing Objection, and the related Declaration of Nicholas J. Henderson, on the following by causing a copy thereof to be placed in a sealed envelope, postage prepaid, addressed as shown below, in the U.S. Mail at Portland, Oregon:

NONE

Additionally, I certify that on May 27, 2015, a full and true copy of the foregoing Objection, and the related Declaration of Nicholas J. Henderson, was serviced on the following recipients electronically via ECF:

- OREN B HAKER obhaker@stoel.com, docketclerk@stoel.com; cejordan@stoel.com; aepeterson-meier@stoel.com; jason.abrams@stoel.com
- NICHOLAS J HENDERSON nhenderson@portlaw.com, csturgeon@portlaw.com; tsexton@portlaw.com; atrauman@portlaw.com
- WENDELL G KUSNERUS wendellkusnerus@dwt.com, lizcarter@dwt.com; pdxdocket@dwt.com
- ERIC D. LANSVERK edl@hcmp.com
- JAMES P LAURICK jlaurick@kilmerlaw.com, tparcell@kilmerlaw.com
- JUSTIN D LEONARD jleonard@LLG-LLC.com, ecf@ml-llp.com; jleonard@pacernotice.com
- JEFFREY C MISLEY jeffm@sussmanshank.com, ecf.jeffrey.misley@sussmanshank.com
- TERESA H PEARSON teresa.pearson@millernash.com, lisa.conrad@millernash.com; brenda.hale@millernash.com
- ALEX I POUST apoust@schwabe.com, docket@schwabe.com; ecfpdx@schwabe.com
- AMIT D RANADE adr@hcmp.com, bankruptcy@hcmp.com; rar@hcmp.com; kcb@hcmp.com
- JOSEPH A SAKAY bankruptcy@hcmp.com, joe.sakay@hcmp.com; Kelly.brown@hcmp.com
- BRADFORD J SANDLER bsandler@pszjlaw.com
- US Trustee, Portland USTPRegion18.PL.ECF@usdoj.gov
- CAROLYN G WADE carolyn.g.wade@doj.state.or.us
- BRITTA E WARREN bew@bhlaw.com, hkt@bhlaw.com

Dated: May 27, 2015.

/s/ Nicholas J. Henderson

Nicholas J. Henderson